Supreme Court, U.S.
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In the Supreme Court of the United States

DOUGLAS VLADIMIR LOPEZ-DUBON,
Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the federal regulations that govern the detention and release of alien juveniles (defined as aliens under 18 years of age) require that notice of the deportation proceedings be served on an adult to whom the juvenile is released?

2) Whether the regulations pertaining to service on minors, as interpreted by the Fifth and Eighth Circuits, provide an alien juvenile with legally sufficient notice of his or her deportation hearing?

3) Whether the panel's reliance on a non-precedential administrative decision was proper in view of prior decisions by this Court, the Fifth Circuit, and other circuit courts?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding before this Court are:

Petitioner: Douglas Vladimir LOPEZ-DUBON.

Respondent: Eric H. HOLDER, Jr., United States Attorney General.

Under Rule 29.6, Rules of the Supreme Court, Petitioner states that he is an individual, and that there are no corporations involved in this matter.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

REGULATIONS AT ISSUE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. Review Is Warranted Because The Circuits Are Divided On Whether The Government Must Serve Notice Of Deportation Proceedings On An Adult For Alien Juveniles 8

II. Review Is Warranted Because The Decisions By The Fifth And Eighth Circuits Contravene The Framework And Purpose Of The Release Regulations 11

III. Review Is Warranted Because Service Under 8 C.F.R. 103.5a(c) Alone Is Legally Insufficient To Provide An Alien Juvenile With Notice Of His Or Her Deportation Hearing 14

IV. Review Is Warranted Because The Panel Improperly Relied On An Agency Decision That Lacked Any Precedential Or Persuasive Value.... 17

CONCLUSION..... 20

APPENDIX

Court of Appeals Opinion (June 16, 2010)..... 1a

Decision of the Board of Immigration Appeals (April 30, 2008)..... 10a

Court of Appeals Order Denying Rehearing En Banc (Aug. 19, 2010)..... 14a

8 C.F.R. § 1236.3..... 16a

TABLE OF AUTHORITIES

Page

CASES

Chevron USA v. Natural Resources Defense Council,
467 U.S. 837 (1984) 18

Christensen v. Harris County,
529 U.S. 576 (2000)..... 18

Flores-Chavez v. Ashcroft,
362 F.3d 1150 (9th Cir. 2004)..... 8, 12

Garcia-Quintero v. Gonzales,
455 F.3d 1006 (9th Cir. 2006)..... 18

In re Gault,
387 U.S. 1 (1967)..... 12

La. Envtl. Action Network v. United States EPA,
382 F.3d 575 (5th Cir. 2004)..... 18

Leal-Rodriguez v. INS,
990 F.2d 939 (7th Cir. 1993)..... 18

Llanos-Fernandez v. Mukasey,
535 F.3d 79 (2d Cir. 2008) 10

Llapa-Sinchi v. Mukasey,
520 F.3d 897 (8th Cir. 2008)..... 9-12

Lopez-Dubon v. Holder,
609 F.3d 642 (5th Cir. 2010)..... 10

Mathews v. Eldridge,
424 U.S. 319 (1976).....15-16

Mullane v. Central Hanover Bank,
339 U.S. 306 (1950)..... 14

Navarro-Miranda v. Ashcroft,
330 F.3d 672 (5th Cir. 2003)..... 18

Quinchia v. U.S. Atty. Gen.,
552 F.3d 1255 (11th Cir. 2008)..... 18

Reno v. Flores,
507 U.S. 292 (1993).....12

Rotimi v. Gonzales,
473 F.3d 55 (2d Cir. 2007).....18

Skidmore v. Swift & Co.,
323 U.S. 134 (1944).....19

United States v. Mead Corp.,
121 S.Ct. 2164 (2001).....18

Yamataya v. Fisher,
189 U.S. 86 (1903).....16

STATUTES AND REGULATIONS

	Page
6 U.S.C. § 101	4
8 U.S.C. § 1229(a)(1)	2
8 U.S.C. § 1229(a)(2)(A)(i)	15
8 U.S.C. § 1252b	3
28 U.S.C. § 1254(1)	1
8 C.F.R. § 103.5a(c)(1)	15
8 C.F.R. § 103.5a(c)(2)(ii)	2
8 C.F.R. § 1003.1(d)	19
8 C.F.R. § 1003.1(g)	19
8 C.F.R. § 1003.26(b)	3
8 C.F.R. § 1236.3(b)(1)	8,12
8 C.F.R. § 1236.3(b)(3)	9,12
8 C.F.R. § 1236.3(b)(4)	9,12
8 C.F.R. § 1236.3(h)	13
8 C.F.R. § 1240.10(c)	12
53 Fed Reg. 17449	13

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at *Lopez-Dubon v. Holder*, 609 F.3d 642 and is reproduced in the Appendix herein at 1a-9a.

The decision of the Board of Immigration Appeals ("BIA"), entered on April 30, 2008, is not officially reported but is reproduced in the Appendix at 10a.

The order of the Fifth Circuit denying rehearing *en banc* is not officially reported but is reproduced in the Appendix at 14a.

JURISDICTION

The judgment of the court of appeals was issued on June 16, 2010. Pet. App. 1a. Petitioner's timely petition for rehearing *en banc* was denied on August 19, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

REGULATIONS AT ISSUE

8 C.F.R. § 103.5a(c)(1) and (2)(ii) provides:

> (1) Generally. In any proceeding which is initiated by the Service, with proposed adverse effect, service of the initiating notice and of notice of any decision shall be accomplished by personal service, except as provided in section 239 of the Act.
>
> (2) Persons confined, minors, and incompetents
>
> (ii) Incompetents and minors. In case of mental incompetency, whether or not

> confined in an institution, and in the case of a minor under 14 years of age, service shall be made upon the person with whom the incompetent or the minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend.

8 C.F.R. § 1236.3 (entitled "Detention and release of juveniles") is reproduced in the Appendix at 16a.

STATEMENT OF THE CASE

For this Court, the Petition presents an immigration case of first impression and great importance. It tests whether the government is required to serve notice of deportation proceedings, including any hearing notices, upon an adult for an alien minor under 18 years of age who is detained in, and released from, federal custody. The Immigrati n and Nationality Act ("INA") is silent with respect to service of notice upon adults on behalf of minors subject to deportation.[1] However, the Board of Immigration Appeals ("BIA"), and the Fifth and Eighth Circuits, have held that adult notification is only required for minors under 14 years of age.[2] In so doing, the courts relied on a federal regulation that requires the government to serve the initial notice of proceedings for alien minors under 14, on a

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[1] The INA requires that the charging notice "be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any)." 8 U.S.C. § 1229(a)(1).

[2] The BIA has only decided this issue through unpublished opinions.

person with whom the minor resides or a "near relative, guardian, committee, or friend." 8 C.F.R. § 103.5a(c)(2)(ii)(the "service regulations"). On the other hand, the Ninth Circuit has held that the government must be serve the notice on a responsible adult pursuant to other regulations that specifically govern the detention and release of alien juveniles—defined as aliens under 18 years of age. *See* 8 C.F.R. § 1236.3 (the "release regulations").

Both the service and release regulations are silent with respect to service of notice upon an adult for minors between 14 and 17 years of age. However, the decision below interprets the service regulations to restrict adult notification to only minors under 14 years under *all* circumstances, regardless of whether the minor is treated as an alien juvenile under the release regulations. Such interpretation has the effect of depriving alien juveniles (between 14 and 17 years of age) of receiving their notice of proceedings through an adult whom which has been designated, pursuant to the release regulations, to ensure the juvenile's appearance at all future court hearings. Thus, resolving this important question of federal law—and ending the conflict between the circuit courts—are the main reasons why this Court should grant the Petition for Writ of Certiorari.

In the present case, Petitioner seeks to rescind his *in absentia* deportation order pursuant to former 8 U.S.C. § 1252b[3] and 8 C.F.R. § 1003.26(b) because he did not receive notice of his deportation hearing as required by the statute and regulations. Specifically, he argues that because he was only 17 years old when he was placed in deportation proceedings, the initial charging notice and subsequent hearing

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[3] Section 1252b is now codified at 8 U.S.C. § 1229a.

notices should have been given to an adult.[4] Relying on 8 C.F.R. § 103.5a(c)(2)(ii), Respondent argues that the government was not required to serve the notice on an adult because Petitioner was not under 14 years of age when it initiated deportation proceedings.

1. Petitioner Douglas Lopez-Dubon is a citizen of Honduras. He was 17 years of age when the U.S. Immigration and Naturalization Service ("INS") detained him and his older brother for crossing illegally into the United States in September 1996.[5] Shortly thereafter, INS issued an Order to Show Cause ("OSC") to Petitioner, charging him of being deportable as an alien unlawfully present in the United States. The OSC informed Petitioner to expect a hearing notice in the future since the date and place of his hearing were unknown at the time. The OSC further notified Petitioner of his obligation to report any changes to his address with the immigration court in Houston, Texas. Petitioner acknowledged receipt of the OSC in writing. After Petitioner provided a Houston address where he could be reached, INS released him from custody.

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[4] There are no indications from the administrative record that the government designated an adult to whom which Petitioner would be released.

[5] The INS is the predecessor to the U.S. Immigration and Customs Enforcement ("ICE") and U.S. Citizenship and Immigration Service ("CIS"), independent agencies operating within the Department of Homeland Security. On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice. Its functions were transferred to the newly formed Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441, 471, 116 Stat. 2135, 2192, 2205 (codified at 6 U.S.C. § 101, *et seq.*) This Petition refers to the INS during proceedings that took place before this change occurred.

The administrative record lacks any information regarding the custodial adult to whom Petitioner was released, if any.

2. Almost seven months after INS released Petitioner, the Houston immigration court finally sent Petitioner a hearing notice to the address he provided INS when he was released. The hearing was set for May 14, 1997 in Houston. The notice, however, was returned as undeliverable and Petitioner did not appear at the hearing. The immigration court rescheduled the hearing for June 18, 1997 in Houston, but the notice was addressed to "Jose W. Vega", a person unknown to Petitioner. Petitioner did not receive the hearing notice.

In another confusing turn of events, on May 21, 1997, the immigration court in Harlingen, Texas issued a hearing notice for Petitioner. The notice was addressed again to "Jose W. Vega" on behalf of Petitioner. The court scheduled the hearing for June 19, 1997 in New Orleans, Louisiana—a day after Petitioner was required to appear in Houston for presumably the same matter. Notably, the Harlingen court issued this hearing notice immediately after it granted a change of venue to Louisiana for Petitioner's brother.

Too add to the confusion, on June 26, 1997, the immigration court in Harlingen issued yet another hearing notice for July 14, 1997 in New Orleans. The court mailed the notice to an unknown Louisiana address and a copy to Petitioner's Houston address that he initially gave upon his release.[6] The

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[6] The administrative record contains no evidence of an address change to Louisiana, let alone any evidence that Petitioner requested a change of venue to New Orleans.

notice sent to the Houston address was returned as undeliverable.

On July 14, 1997, the immigration court in New Orleans entered an *in absentia* deportation order after Petitioner did not appear at the hearing.

3. On November 17, 2006, Petitioner filed a motion to reopen his deportation proceedings with the immigration court in New Orleans, asserting, *inter alia*, that he never received his hearing notice, and that the change of venue to New Orleans was improper because he did not initiate the hearing transfer. A month later, the immigration judge denied the motion finding that Petitioner was properly served with the hearing notice because it was sent to the address he provided to INS, and there was no evidence that Petitioner notified the court of a subsequent change in his address.

4. Petitioner appealed to the BIA, which dismissed the appeal on November 20, 2007, on the ground that he was properly served with notice of proceedings pursuant to former 8 U.S.C. § 1252b. Petitioner subsequently filed a motion for reconsideration, arguing, *inter alia*, that notice of his proceedings was legally insufficient because he was only 17 years of age when he was detained by INS, and therefore lacked the ability to comprehend the nature of his legal proceedings.

On April 30, 2008, the BIA denied the motion for reconsideration. Pet. App. 10a. The BIA held that, absent evidence that Petitioner changed his address with the court, the record supported the finding that Petitioner was given proper notice pursuant to 8 U.S.C. § 1252b. The BIA also found that Petitioner "was 17 years old when he was served personally with the Order to Show Cause; therefore, service of

the Order to Show Cause upon the [Petitioner] was proper" under 8 C.F.R. § 103.5a(c)(2)(ii)(requiring service on adults only for minors under 14 years of age). Pet. App. 11a-12a.

5. Petitioner filed a petition for review with the U.S. Court of Appeals for the Fifth Circuit, requesting review of the BIA's decision on the basis that the government failed to serve the notice of proceedings on an adult pursuant to the release regulations, and therefore violated Petitioner's due process rights.

On June 16, 2010, the Fifth Circuit dismissed the petition holding, in pertinent part, that (i) the BIA's and Eight Circuit's interpretation of the regulations was not unreasonable with respect to serving notice on an adult only for minors under 14; (ii) the government did not violate due process; and (iii) substantial evidence supported the BIA's finding that Petitioner was at fault for not receiving his hearing notice because he failed to keep his address current with the immigration court. Pet. App. 1a-9a.

6. Petitioner filed a petition for rehearing *en banc* to the Fifth Circuit, arguing in part that the panel's reliance on the BIA's unpublished decision was improper because the underlying administrative decision lacked any precedential or persuasive value to warrant agency deference in light of prior decisions by this Court, the Fifth Circuit, and the other circuit courts. Alternatively, Petitioner requested that his case be remanded to the BIA for additional, meaningful guidance on the issue at hand.

On August 19, 2010, the Fifth Circuit dismissed the petition for rehearing without opinion. Pet. App. 14a.

REASONS FOR GRANTING THE WRIT

I.

Review Is Warranted Because The Circuits Are Divided On Whether The Government Must Serve Notice Of Deportation Proceedings On An Adult For Alien Juveniles

The panel decision below effectively deprives an alien juvenile from receiving notice of his or her immigration court hearing through an adult designated to ensure the juvenile's appearance in court. Review of the decision is necessary and appropriate since the opinions conflict with a decision of the Ninth Circuit.

1. The Ninth Circuit held that notice of deportation proceedings with respect to alien juveniles under 18 years of age, must be served on a responsible adult to whom the juvenile is released from agency custody. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1163 (9th Cir. 2004). In reaching its decision, the Court carefully considered the purpose and framework of the release regulations in 8 C.F.R. § 1236.3. *Id.* at 1156-58. Reviewing the regulations, the Court noted that the overarching purpose of § 1236.3 is to protect the welfare of alien minors who are detained in federal custody. *Id.* at 1157. Under these regulations, the government agency must release the alien juvenile (defined as an alien under 18 years of age) to a responsible adult who assumes custody over the juvenile. *See* 8 C.F.R. § 1236.3(b)(1). As part of the release process, the Court noted certain provisions which explicitly require the custodial adult to sign a written agreement with the agency to "ensure the juvenile's

presence at all future proceedings." *Id.* at 1156-57; *see also* 8 C.F.R. § 1236.3(b)(3),(4). On that basis, the Court found that "[t]he fair implication of § [1236.3] as a whole is that any adult to whom an alien juvenile is released is charged with the dual responsibilities of caring for the juvenile and ensuring that the juvenile keeps his obligations to the court." *Id.* at 1156. The Court further reasoned that the regulatory framework presumes that detained aliens under 18 years of age should not be responsible for understanding their rights and obligations with respect to their deportation proceedings. *Id.* at 1157.

Given the purpose and framework of the release regulations, the Ninth Circuit concluded that the only reasonable interpretation of 8 C.F.R. 1236.3, is that it requires the government to serve notice of the juvenile's proceedings on the custodial adult. *Id.* at 1163. To hold otherwise would lead to an unreasonable interpretation of the regulations, as the Court poignantly stated it would be "illogical for the INS both to require the legally responsible adult to ensure the juvenile's attendance at the hearing and to withhold the notice of hearing which would enable the adult to fulfill that responsibility and to understand the consequences of a failure to do so." *Id.* at 1157.

2. By contrast, the Eighth Circuit, in a split opinion, held that notice of the deportation proceedings is served on an adult only when the alien minor is under 14 years of age. *Llapa-Sinchi v. Mukasey*, 520 F.3d 897, 899-901 (8th Cir. 2008). In reaching its decision, the Eighth Circuit agreed with the BIA's determination that the service regulations at 8 C.F.R. § 103.5a(c)(2)(ii) only required service on

an adult for minors under 14 years of age, despite the special treatment afforded to alien juveniles under the release regulations. The Court's rationale for discounting the release regulations was that "[t]he purpose of [§ 103.5a(c)] is to let individuals know the details of their legal proceedings. The purpose of [§ 1236.3], however, is not to provide knowledge, but to provide assistance to minors in a foreign land...." *Id.* at 900-01. The dissenting opinion, however, stated that the case should have been governed by the holding in *Flores-Chavez* because the matter originated within the Ninth Circuit. *Id.* at 901-02.

3. The decision below adopted the decision of the Eighth Circuit, and found that Petitioner was not entitled to have his hearing notice served on an adult because he was not under 14 years of age when he was placed in proceedings. *See* Pet. App. 4a-8a; *Lopez-Dubon v. Holder*, 609 F.3d 642, 646 (5th Cir. 2010). Additionally, the Court considered § 103.5a(c) as controlling over § 1236.3 because the service regulations explicitly call for notification on an adult, whereas the release regulations do not. *Id.* Rejecting the Ninth Circuit's decision, the Court stated that it "would be a strained analysis indeed ... that the more general release provision somehow negated the specific service provision despite making no reference to notification at all." *Id.*

4. The Second Circuit considered this issue but opted to remand the case to the BIA for a precedential interpretation of the relevant regulations. *See Llanos-Fernandez v. Mukasey*, 535 F.3d 79 (2d Cir. 2008). To date, the BIA has not made a decision.

5. The decision below conflicts with *Flores-Chavez* and creates a clear circuit split on whether the government must serve notice of deportation proceedings on an adult under the release regulations. Contrary to the Fifth and Eighth Circuits, the Ninth Circuit sets forth a reasonable interpretation of the release regulations, necessitating adult notification of proceedings to ensure the juvenile's appearance in court. Further, as indicated by Judge Bye in his dissent in *Llapa-Sinchi*, the differential treatment within the country regarding service on alien juveniles could promote forum shopping by both parties. *Id.* at 901-02. Therefore, this Court should review and correct the holdings of the Fifth and Eighth Circuits to restore uniformity.

II.

Review Is Warranted Because The Decisions By The Fifth And Eighth Circuits Contravene the Framework And Purpose Of The Release Regulations

A review of the *Flores-Chavez* case reveals that requiring service of notice on the adult to whom the alien juvenile is released is a reasonable interpretation of the release regulations in light of its framework and purpose. Petitioner therefore submits that the conflicting opinions by the Fifth and Eighth Circuits are erroneous and that this Court may wish to summarily reverse the decision below.

1. The regulatory framework of 8 C.F.R. § 1236.3 supports the position that the government must serve notice of proceedings on an adult to whom the alien juvenile is released. As the Ninth Circuit correctly observed, the release regulations presume

that unaccompanied aliens under 18 years of age whom are detained should not be responsible for understanding their responsibilities, and therefore require additional safeguards to ensure they are not deprived of their right to a hearing. *See Flores-Chavez*, 362 F.3d at 1157; *see also In re Gault*, 387 U.S. 1, 33-34 (1967). This presumption is valid particularly in light of another regulation prohibiting an immigration judge from considering admissions of an unrepresented minor under 18 who is not accompanied by a guardian, friend or relative. *See* 8 C.F.R. § 1240.10(c).

Given the concern over a juvenile's presumed lack of understanding of the legal proceedings, the regulations obligate the custodial adult of ensuring the appearance of the juvenile in court. *See* 8 C.F.R. § 1236.3(b)(1),(3)-(4). Therefore, it is only logical that the government serve the hearing notice on the adult responsible for meeting that obligation.

2. In the present case, the panel below adopted the Eighth Circuit's decision in *LLapa-Sinchi*, which held that adult notification of the proceedings is only required for alien minors under 14 years of age in view of 103.5a(c)(2)(ii). The Eighth Circuit reasoned that the release regulations provide only basic assistance to foreigners whereas the service regulations provide knowledge of the alien's legal proceedings. *Llapa-Sinchi*, 520 F.3d at 900-01. However, the Court's rationale is erroneously premised on a false presumption that the purpose of the release regulations is merely to provide basic assistance to a juvenile upon release from custody. As this Court stated, the explicit purpose of the release regulations is "to protect the welfare of the juvenile". *Reno v. Flores*, 507 U.S. 292, 311 (1993).

With this purpose in mind, coupled with the concern over the likelihood that unaccompanied juveniles will actually appear in court, the government devised a system by which juveniles are released into the custody and care of a responsible adult, who in turn has the responsibility of ensuring the juveniles attend the proceedings. *See* 53 Fed Reg. 17449 (May 17, 1988). The resulting regulations reflect not only the concerns over the well-being and safety of the juveniles, but also the importance of knowing critical information about the legal proceedings. For example, the agency is required to serve a detained juvenile with a Form I-770, Notice of Rights and Disposition. *See* 8 C.F.R. § 1236.3(h). This form explains the legal basis for the juvenile's detention, and informs the juvenile of the right to telephone a parent, legal guardian, adult friend or relative. It also notifies the juvenile of the right to speak to an attorney and to have a hearing before an immigration judge. Thus the Eighth Circuit's description of the regulation's purpose is seriously understated.

3. The panel below also found the service regulation controlling, because it specifically provides for service upon an adult whereas the release regulations do not. Pet. App. 5a-6a. In so doing, the panel misses the point of *Flores-Chavez*, which is that the release regulations are specific in and of themselves, governing particular situations where an alien minor is detained and released by immigration authorities. By comparison, § 103.5a(c) does not make any references to alien minors who are detained and released by the government agency. As a result, there is no guidance on how such aliens should be served or treated under the service regulations. Put another way, the service

regulations are only applicable to alien minors under 14 *unless they are detained and released by immigration officials*; in such event, the release regulations contemplate that these minors, who are most likely unaccompanied by a parent or adult, will be provided greater protection commensurate to their situation.

III.

Review Is Warranted Because Service Under 8 C.F.R. 103.5a(c) Alone Is Legally Insufficient To Provide An Alien Juvenile With Notice Of His Or Her Deportation Hearing

1. The panel held that the government did not violate Petitioner's due process rights for not sending the hearing notice to an adult. Pet. App. 6a-8a. In so holding, the panel turned to this Court's standard in *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950), to determine whether service under 8 C.F.R. § 103.5a(c) alone satisfies due process requirements for alien juveniles. Under this standard, notice is legally sufficient if it is "reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314 (emphasis added). On that basis, the panel found that notice under the service regulations was legally adequate to notify Petitioner of his deportation hearing. Unfortunately, the panel failed to consider that the service regulations only govern the *initial* notice of proceedings, which may or may not include information relating to the time and

place of the court hearing.[7] Notably, service of notice under 8 C.F.R. § 103.5a applies only in the following situations:

> In any proceeding which is *initiated* by the Service, with proposed adverse effect, service of the *initiating notice* and of notice of any decision by a Service officer shall be accomplished by personal service.

§ 103.5a(c)(1)(emphases added).

The panel's decision regarding the legal sufficiency of notice under 8 C.F.R. § 103.5a(c) for alien juveniles is based on a faulty presumption that the initial notices will always include information about the time, place and date of the court hearing. However, notices that initiate deportation proceedings may not necessarily contain information about the alien's hearing date, like the OSC issued by INS in the instant matter. In such instances, the procedural safeguards in § 103.5a(c) would not cover subsequent hearing notices issued by the immigration court. Thus, it cannot be said that service under § 103.5a(c) is reasonably calculated to reach an alien juvenile *under all circumstances*.

2. Given that the due process interests of many alien juveniles are at stake, the panel also failed to consider whether § 103.5a(c), as interpreted by the BIA and Eighth Circuit, provides constitutionally sufficient notice to alien juveniles. Under *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court set forth

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[7] For cases involving a postponement in the hearing, "written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or the alien's counsel of record, if any) specifying the new time or place of the proceedings...." 8 U.S.C. § 1229(a)(2)(A)(i).

a three-prong test for analyzing whether the procedural safeguards created by an administrative agency are constitutionally sufficient to protect the due process interests of individuals. *Id.* at 332-335. Under *Mathews*, the court must consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Applying the *Mathews* test here, it is apparent that requiring adult notification only for minors under 14 years of age will violate the liberty interests of alien juveniles between the ages of 14 and 17. First, there is a substantial private interest in receiving notice in protecting one's liberty interests. *See Yamataya v. Fisher*, 189 U.S. 86 (1903). Second, the risk of error is too substantial if adult notification is only required for minors under 14 years of age. As the regulatory framework of § 1236.3 shows, alien minors under 18 who are apprehended and detained by the government, require additional protections to safeguard their liberty interests throughout deportation proceedings, especially since most of these aliens are unaccompanied by an adult. The regulations require that these aliens be released to a responsible adult who will oversee the process and ensure the alien's appearance in court. The facts of the present case underscore the importance of having

a responsible adult involved in the proceedings. Here, three different courts purported to have jurisdiction over Petitioner's case, two of which issued conflicting hearing notices at one point. Petitioner's proceedings were also transferred to another jurisdiction without his knowledge. Thus, having an adult navigate him through the process and ensure his court appearance was critical. Finally, the burden placed on the government is minimal when compared to the interest of protecting the welfare and due process rights of the juvenile.

Balancing these factors, the Court should conclude that the government violates the due process rights of alien juveniles by not requiring that notice be served on an adult who carries the important obligation of ensuring the juvenile's appearance in court.

IV.

Review Is Warranted Because The Panel Improperly Relied On An Agency Decision That Lacked Any Precedential Or Persuasive Value

1. The panel has created a holding contradictory to the precedent of the Supreme Court, the Fifth Circuit and other U.S. Courts of Appeal relating to whether deference should be given to an agency's non-precedential decision. In dismissing the petition for review, the panel deferred to the BIA's unpublished opinion below, noting that its interpretation of the service regulations was reasonable. Pet. App. 5a-6a.

The BIA decision below is not owed any deference because it was not precedential, and thus lacked the force of law necessary for agency deference. Where

the law is ambiguous or silent about a certain issue, the court may defer to an agency's interpretation unless it is unreasonable or clearly erroneous. *See Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984); *see also Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003)(the same applies for an agency's interpretation of its regulations). This Court has held that an agency may be given *Chevron* deference where the agency has been delegated with the authority to make rules carrying the force of law, and that the agency's interpretation in question is promulgated in the exercise of that authority. *United States v. Mead Corp.*, 121 S.Ct. 2164, 2171-74 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). The Fifth Circuit has held that an agency's unpublished interpretation of a law that is not the result of formal adjudication or rulemaking, does not warrant *Chevron* deference. *La. Envtl. Action Network v. United States EPA*, 382 F.3d 575, 583 (5th Cir. 2004)(declining to apply *Chevron* deference to the EPA's unpublished preamble because it was created without going through a notice-and-comment period). Other U.S. Courts of Appeals have held that non-precedential BIA decisions should not be entitled to agency deference because they do not carry the force of law. *See, e.g., Quinchia v. U.S. Atty. Gen.*, 552 F.3d 1255, 1258 (11th Cir. 2008); *Rotimi v. Gonzales*, 473 F.3d 55, 57-58 (2d Cir. 2007); *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1012-14 (9th Cir. 2006); *Leal-Rodriguez v. INS*, 990 F.2d 939, 946 (7th Cir. 1993).

Furthermore, agency regulations provide that the BIA, "through *precedent* decisions, *shall* provide clear and uniform guidance to the Service, the immigration judges, and the general public on the

proper interpretation and administration of the Act and its implementing regulations." 8 C.F.R. § 1003.1(d)(emphases added). A BIA precedent decision is "binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States." 8 C.F.R. § 1003.1(g). Moreover, a decision does not become precedential unless it goes through a selection process requiring a majority vote by the permanent members of the BIA. *Id.*

In the instant matter, the BIA's non-precedential decision lacked any authoritative effect by definition of its own regulations. The decision was not the result of the agency's rulemaking process for creating precedential opinions. Therefore, the BIA's opinion is not entitled to agency deference under *Chevron*.

2. Insofar as the panel found the BIA's opinion persuasive, the administrative decision lacked any meaningful reasoning regarding the central issue of whether an alien juvenile who is detained and released by INS is entitled to have notice of his hearing sent to a responsible adult. Deference to an agency interpretation is premised on the fact that "the agency considered the matter in a detailed and reasoned fashion...." *Chevron*, 467 U.S. at 865; *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944). Despite the salient tension between the Ninth and Eighth Circuit on the aforementioned issue, the BIA chose to issue a non-precedential decision signed by only one BIA member finding that Petitioner was properly served with notice. The entire decision dedicated only two sentences to the issue of proper service on an alien minor. The decision failed to provide any meaningful

interpretation of the relevant regulations, nor does it give any justification to adopt the reasoning of the Eighth Circuit or reject the reasoning of the Ninth Circuit, other than to state, "[Petitioner] was 17 years old when he was served personally with the Order to Show Cause; therefore, service of the Order to Show Cause upon [Petitioner] was proper." Pet. App. 11a. While an unpublished decision may be considered persuasive, the BIA's interpretation was not the result of any detailed or reasoned consideration that would support its persuasive value.

Therefore, the panel's decision was erroneous because it relied upon an unpublished BIA decision which lacked any meaningful rationale for its decision. Accordingly, Petitioner respectfully submits that, at the least, the Court consider the case for summary reversal.

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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DOUGLAS VLADIMIR LOPEZ-DUBON, Petitioner
v. ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL, Respondent

No. 08-60478

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

609 F.3d 642

June 16, 2010, Filed

[*643] DENNIS , Circuit Judge:

In June 1996, Petitioner Douglas Vladimir Lopez-Dubon ("Lopez-Dubon") entered the United States without inspection or authorization. He was apprehended in September of that year and was personally served with an Order to Show Cause ("OSC") why he should not be deported. Lopez-Dubon was 17 at the time. Upon his release he was informed that he would be notified of the date and location of his deportation hearing by mail, and that it was his responsibility to keep the immigration [*644] authorities informed as to his current address. Notice was mailed to the address Lopez-Dubon had provided before his release, but was returned because Lopez-Dubon no longer lived there and the postal service could not complete delivery. A year later, on July 14, 1997, after Lopez-Dubon failed to appear, an immigration judge ordered him deported in absentia.

On November 17, 2006, Lopez-Dubon filed a motion to reopen his case in order to seek adjustment of his immigration status. Lopez-Dubon's motion stated that he was 17 at the time he was initially detained in September 1996. The motion did not argue that his age had any relevance, however, but

instead claimed that he had never received notice of the deportation hearing. An immigration judge denied the motion and Lopez-Dubon appealed to the Board of Immigration Appeals ("BIA"), which dismissed his appeal on the grounds that a notice of the hearing was sent to the address Lopez-Dubon had provided when he was released, but was returned as undeliverable. Lopez-Dubon filed a motion for reconsideration, arguing for the first time that notice should have been served on a responsible adult because Lopez-Dubon was only 17 at the time he was detained. The BIA denied the motion but, rather than holding that the age-related-notice argument was not properly before it, the BIA addressed the issue on the merits and rejected Lopez-Dubon's argument. Lopez-Dubon timely filed a petition for review.

The first question in this case is whether this court has jurisdiction over Lopez-Dubon's appeal. An alien's failure to exhaust administrative remedies is a jurisdictional bar to our consideration of an issue. 8 U.S.C. § 1252(d)(1); *Roy v. Ashcroft*, 389 F.3d 132, 137 (5th Cir. 2004). In this case, Lopez-Dubon did not raise the issue of age-related notice until his motion for reconsideration before the BIA. Nevertheless, the BIA addressed the issue on the merits. We have not previously addressed the question of whether an issue not properly raised by a petitioner in immigration proceedings but nevertheless addressed on the merits by the BIA may be considered by this court. *See Omari v. Holder*, 562 F.3d 314, 319 (5th Cir. 2009) (noting a circuit split on this issue but declining to choose a side). Almost every court of appeals will address an issue on the merits when the BIA has done so, even if the

issue was not properly presented to the BIA itself. *See Lin v. Attorney General*, 543 F.3d 114, 122-26 (3d Cir. 2008)(discussing circuit split).[1] We agree. We are persuaded that, as the Tenth Circuit has reasoned, the purpose of the statutory exhaustion requirement is to allow the BIA "the opportunity to apply its specialized knowledge and experience to the matter" and to "resolve a controversy or correct its own errors before judicial intervention." *Sidabutar v. Gonzales*, 503 F.3d 1116, 1122 (10th Cir. 2007) (internal citations and quotation marks omitted). These purposes are fulfilled when the BIA chooses to address an issue on the merits despite potential defects in its posture before the BIA. Thus, "[i]f the BIA deems an issue sufficiently presented to consider it on the merits, such action by the BIA exhausts the issue as far as the agency is concerned and that is all that [8 U.S.C.] § 1252(d)(1) requires to confer our jurisdiction." *Id.* at 1119.[2] We therefore have jurisdiction over **[*645]** the question of whether the notice provided to Lopez-Dubon was insufficient because of his age at the time of his detention.

This court reviews a decision by the BIA under a "highly deferential" standard. *Zhao v. Gonzales*, 404 F.3d 295, 301-03 (5th Cir. 2005). The BIA's factual findings are reviewed under a "substantial evidence" standard, such that this court will not overturn factual findings unless the evidence compels a contrary conclusion. *Mireles-Valdez v. Ashcroft*, 349

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[1] Only the Eleventh Circuit bars review in such a circumstance. *Amaya-Artunduaga v. Attorney General*, 463 F.3d 1247, 1250-51 (11th Cir. 2006).

[2] U.S.C. § 1252(d)(1) simply states that a federal court may review a final order of removal only if "the alien has exhausted all administrative remedies available to the alien as of right."

F.3d 213, 215 (5th Cir. 2003). Question of law are reviewed de novo, but "[w]e accord deference to the Board's interpretation of immigration statutes unless there are compelling indications that the Board's interpretation is incorrect." *Rojas v. INS*, 937 F.2d 186, 189 (5th Cir. 1991).

On appeal, Lopez-Dubon argues that the notice of deportation was never properly served because he was 17 at the time of his detention and release and therefore notice should have been served upon a responsible adult instead of him. Lopez-Dubon's argument rests on the interaction, if any, between 8 C.F.R. § 1236.3, governing the release of juvenile aliens, and 8 C.F.R. § 103.5(a), governing service of notice requirements for deportation proceedings. Section § 1236.3 provides that a juvenile (defined as an alien under the age of 18) "shall be released, in order of preference, to: (i) A parent; (ii) Legal guardian; or (iii) An adult relative (brother, sister, aunt, uncle, grandparent) who is not presently in Service detention . . . ." This regulation says nothing about notice. However § 103.5(a), which is entitled "Service of notification, decisions, and other papers by the Service," states that service of notice for immigration proceedings on a responsible adult is only required "in the case of a minor under 14 years of age." *Id.* at § 103.5a(c)(2)(ii). Lopez-Dubon argues, essentially, that despite the explicit provision calling for service on an adult only if the detained minor is under 14 years of age, the separate provision requiring release of aliens under 18 to an adult's custody overrides the specific service of notice provision and requires that notice be served on an adult for all aliens under 18 years of age. In so arguing, Lopez-Dubon relies on a Ninth Circuit

opinion, Flores-Chavez v. Ashcroft, 362 F.3d 1150 (9th Cir. 2004), which adopted this reasoning, determined that the two provisions were inconsistent, and held that the BIA's decision that the service provision controlled was unreasonable. Instead, the Ninth Circuit held, the release provision required that notice be served on an adult for any alien under 18 years of age. *See id.* at 1163.

The BIA, however, concisely rejected that reasoning in this case. The BIA acknowledged that the regulations require notice to be served on an adult for aliens under 14 years of age, but noted that Lopez-Dubon was 17 at the time of his detention and therefore held that service of the Order to Show Cause upon him was proper. Though doubtless aware of Flores-Chavez, the BIA instead cited to an Eighth Circuit case, *Llapa-Sinchi v. Mukasey*, 520 F.3d 897 (8th Cir. 2008). *In Llapa-Sinchi*, the Eighth Circuit rejected the Ninth Circuit's reasoning in *Llapa-Sinchi v. Mukasey*, 520 F.3d at 900-01. The Eighth Circuit instead deferred to the BIA's determination in Llapa-Sinchi's case that the general service provision of § 103.5(a) controls.[3] *Id.*

[*646] By citing to *Llapa-Sinchi*, the BIA in this case adopted the Eighth Circuit's approach and reaffirmed that it interprets its own regulations to require notice to be served on an adult only when an alien is under 14 years of age. We cannot say that

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[3] The Second Circuit was also presented with this question in *Llanos-Fernandez v. Mukasey*, 535 F.3d 79, 85 (2d Cir. 2008). The Second Circuit declined to decide the issue and instead remanded to the BIA for additional guidance. The BIA has not issued a new opinion in the case as of this writing.

this is an unreasonable interpretation of the regulations. The service provision specifically calls for notice to be served on an adult only when the alien is under 14 years of age. The release provision relied upon by Lopez-Dubon and by the Ninth Circuit does not cross-reference or address the service provision, and it would be a strained analysis indeed that would resolve this issue by deciding not only that the provisions were inconsistent but that the more general release provision somehow negated the specific service provision despite making no reference to notification at all. We therefore affirm the BIA's holding that notice must be served on an adult only for aliens under 14 years of age. *See also Interiano de Rivas v. Gonzales*, 177 F. App'x 447, 448-51 (5th Cir. 2006) (unpublished) (holding that service on a 17 year-old was proper without addressing the question of age); *Matter of Ponce-Hernandez*, 22 I. & N. Dec. 784, 785 (B.I.A. 1999) (holding that service on a 15-year-old was proper).

Lopez-Dubon also argues that service of notice of a deportation hearing on a minor is an unconstitutional violation of due process. We are unpersuaded. An alien is entitled to due process with regard to his deportation hearing. *United States v. Estrada-Trochez*, 66 F.3d 733, 733-36 (5th Cir. 1995). For service to satisfy the requirements of due process, it must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). In general, sending notice of a deportation hearing to an alien satisfies this requirement. *Estrada-Trochez*, 66 F.3d at 736.

Lopez-Dubon argues that due process requires that notice be served upon a responsible adult if an alien is under 18. But minors "can be responsible for their own legal status and can waive their constitutional rights" in some circumstances. *Llapa-Sinchi*, 520 F.3d at 900. The Supreme Court has held that "minors can be responsible for waiving their right to appeal deportation and custody determinations." *Id.* (citing *Reno v. Flores*, 507 U.S. 292, 308-09, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)). Minors are also empowered to waive various other legal rights, at certain times and in certain contexts, including Miranda rights, the right to appeal, and the right to a jury trial. *See Llapa-Sinchi*, 520 F.3d at 900 (listing cases). As the Eighth Circuit pointed out in *Llapa-Sinchi*, many states allow personal service on minors as young as 14. *Id.* (citing Missouri, Minnesota, Nevada, Arkansas and North Dakota statutes). Here, Lopez-Dubon was 17 years old, only one year shy of legal adulthood. He conceded that he was informed that he would have to appear for a deportation hearing, and that he understood that responsibility and planned to appear. Thus, we hold that the notice served in this case was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the actions and afford them an opportunity to present their objections," *Mullane*, 339 U.S. at 314. There was no due process violation.

Having established that Lopez-Dubon was the proper party to receive [*647] notice and that serving notice on him at 17 years of age was not a due process violation in and of itself, we must consider whether the BIA's factual finding that notice was properly served was supported by substantial

evidence. An alien is entitled to written notice of immigration proceedings against him, but an alien is responsible for updating immigration authorities with his current address. *Gomez-Palacios v. Holder*, 560 F.3d 354, 358 (5th Cir. 2009). Thus an order of removal will not be set aside, even if the alien did not receive notice, if "the alien's failure to receive actual notice was due to his neglect of his obligation to keep the immigration court apprised of his current mailing address." *Gomez-Palacios*, 560 F.3d at 360.

The BIA found that notice of the deportation hearing was sent by certified mail to Lopez-Dubon at his last known address, and that Lopez-Dubon was advised at the time of his release of the consequences of failure to appear at his deportation hearing, and also of his responsibility to keep the immigration court updated as to his whereabouts so that notice of any proceedings could be sent to him. The BIA found that there was no evidence that Lopez-Dubon had attempted to update his address with the immigration court. Lopez-Dubon has not pointed to any evidence suggesting that these findings were clearly erroneous. The findings were supported by substantial evidence: the record contained the notice that was sent, which was returned when Lopez-Dubon could not be located at the address he provided, and there is no evidence that Lopez-Dubon kept the immigration court informed of his change of address, nor does his affidavit state that he did so. We therefore affirm the BIA's finding that Lopez-Dubon's failure to receive notice of his hearing was due to his own neglect, and he is not entitled to relief on this ground.

Finally, we reject Lopez-Dubon's argument that the BIA and the immigration judge abused their

discretion in failing to reopen his deportation proceedings sua sponte. The authority to sua sponte reopen deportation proceedings is entirely discretionary, and we lack jurisdiction to review this claim. *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 250 (5th Cir. 2004).

For the foregoing reasons the petition for review is DENIED.

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A75 282 170- New Orleans, LA
Date: Apr 30 2008

In re: DOUGLAS VLADIMIR LOPEZ-DUBON
In Deportation Proceedings -- Motion

ON BEHALF OF RESPONDENT: Jennifer L. West
ON BEHALF OF DHS: Joseph B. La Rocca
Assistant Chief Counsel

APPLICATION: Reconsideration

We will accept this case by certification to avoid any question of untimeliness. *See* 8 C.F.R §1003.1(c). This case was last before the Board of November 20, 2007, when we dismissed the respondent's appeal from the Immigration Judge's decision denying the respondent's motion to reopen. The immigration Judge had previously ordered the respondent deported in absentia for his failure to appear for the hearing on July 14, 1997. The respondent now moves the Board pursuant to 8 C.F.R. § 1003.2 to reconsider our decision.

In the motion to reconsider, the respondent contents that there is no evidence that the scheduling and notice of hearings was done in the prescribed methods. The respondent also asserts

that the Board erred in failing to address how service on Mr. Vega complies with the regulatory requirements at 8 C.F.R. §1003.17, because Mr. Vega was not counsel of record, nor did the respondent ever retain Mr. Vega for representation in his case. The respondent avers that the record on appeal reflects a clear bias in favor of the Immigration Judge. The respondent also claims that as a minor, he could not have legally possessed the ability to receive any oral warnings. Finally, the respondent asserts that the Immigration Court failed to provide him with written notice of the consequences of a failure to appear.

We disagree with the respondent's contentions in the motion to reconsider. The evidence of record supports the finding that the respondent was given proper notice of the deportation hearing in accordance with section 242B of the Immigration Act, 8 U.S.C. § 1252b. Initially, we note that if the alien is a minor under 14 years of age, the regulations require that service be made upon the person with whom the minor resides; and whenever possible, service must also be made on the near relative, guardian, committee, or friend. *See* 8 C.F.R. §103.5a(c)(2)(ii). However, the respondent was 17 years old when he was served personally with the Order to Show Cause; therefore, service of the Order to Show Cause upon the respondent was proper. *See Llapa-Sinchi v. Mukasey*, 2008 WL 819093 (8th Cir. 2008).

The Board functions as an appellate body charged with the review of decisions of Immigration Judges in deportation cases. 8 C.F.R. §1003.1 (b)(2). The Board must resolve the questions before it in a manner that is timely, impartial, and consistent with

the Act and regulations. 8 C.F.R. § 1003.1 (d)(1). Contrary to the respondent's contention on appeal that the record reflects a clear bias in favor of the Immigration Judge, the Board's previous detailed and extensive decision applied the facts of the respondent's case to the applicable statute, regulations and case law, in determining that the respondent received proper notice of his hearing. As we stated in our previous decision, the fact that several earlier notices of hearing were sent to Jose W. Vega, Esquire, are irrelevant to the finding of proper notice in this case. The fact remains that a copy of the last hearing notice, dated June 26, 1997, was sent to the respondent at his address which appears on the Order to Show Cause: 940 Airline, Apt. #10723, Houston, TX 77037. The record contains the hearing notice was returned to the Immigration Court as undeliverable. There is no evidence in the record that the respondent has ever submitted a change of address form (Form EOIR-33) to the Immigration Court, despite the fact that he was advised of the requirement to do so.

Furthermore, the notice of hearing dated June 26,1997, was sent to the respondent by certified mail and advised the respondent of the consequences of the failure to appear at his proceedings, pursuant to section 242B(a)(2)(A) of the Act. However, the respondent failed to provide an address where he could be contacted. The Order to Show Cause served personally upon the respondent was written in English and Spanish, and specifically advised the respondent that he was required to provide written notice, within five (5) days, of any change in his address or telephone number to the office of the Immigration Judge, and any notices would be mailed only to the last address provided. *See* Order to Show

Cause, at 4. The hearing notice was sent to the respondent's last known address by certified mail, and the Immigration Judge properly ordered him deported in absentia after he failed to appear for his hearing on July 14, 1997.

Finally, as we stated in our previous decision, the respondent's motion to reopen for adjustment of status is untimely, pursuant to *Matter of M-S*, 22 I&N Dec. 349 (BIA 1998). Consequently, the respondent has failed to present any additional legal arguments, a change of law, or an argument or aspect of the case which was not previously considered by the Board. Accordingly, the respondent's motion to reconsider will be denied.

ORDER: The motion is denied

/s/

FOR THE BOARD

DATE FILED, 08/19/2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-60478

DOUGLAS VLADIMIR LOPEZ-DUBON,
Petitioner

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the

Board of Immigration Appeals

ON PETITION FOR REHEARING EN BANC

(Opinion 6/16/10, 5 Cir., ____, _____, F.3d ____)

Before JOLLY and DENNIS, Circuit Judges, and BOYLE, District Judge.*

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor

(FED. R. APP. P and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Dennis

United States Circuit Judge

*District Judge, Northern District of Texas, sitting by designation.

8 C.F.R. § 1236.3 -Detention and release of juveniles.

(a) Juveniles. A juvenile is defined as an alien under the age of 18 years.

(b) Release. Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines:

(1) Juveniles shall be released, in order of preference, to:

(i) A parent;

(ii) Legal guardian; or

(iii) An adult relative (brother, sister, aunt, uncle, grandparent) who is not presently in Service detention, unless a determination is made that the detention of such juvenile is required to secure his or her timely appearance before the Service or the Immigration Court or to ensure the juvenile's safety or that of others. In cases where the parent, legal guardian, or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at a Service office located near the parent, legal guardian, or adult relative.

(2) If an individual specified in paragraphs (b)(1)(i) through (iii) of this section cannot be located to accept custody of a juvenile, and the juvenile has identified a parent, legal guardian, or adult relative in Service detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.

(3) In cases where the parent or legal guardian is in Service detention or outside the United States,

the juvenile may be released to such person as is designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(4) In unusual and compelling circumstances and in the discretion of the Director of the Office of Juvenile Affairs, a juvenile may be released to an adult, other than those identified in paragraphs (b)(1)(i) through (b)(1)(iii) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(c) Juvenile coordinator. The case of a juvenile for whom detention is determined to be necessary should be referred to the "Juvenile Coordinator," whose responsibilities should include, but not be limited to, finding suitable placement of the juvenile in a facility designated for the occupancy of juveniles. These may include juvenile facilities contracted by the Service, state or local juvenile facilities, or other appropriate agencies authorized to accommodate juveniles by the laws of the state or locality.

(d) Detention. In the case of a juvenile for whom detention is determined to be necessary, for such interim period of time as is required to locate suitable placement for the juvenile, whether such placement is under paragraph (b) or (c) of this section, the juvenile may be temporarily held by Service authorities or placed in any Service detention

facility having separate accommodations for juveniles.

(e) Refusal of release. If a parent of a juvenile detained by the Service can be located, and is otherwise suitable to receive custody of the juvenile, and the juvenile indicates a refusal to be released to his or her parent, the parent(s) shall be notified of the juvenile's refusal to be released to the parent(s), and they shall be afforded the opportunity to present their views to the district director, chief patrol agent, Director of the Office of Juvenile Affairs or immigration judge before a custody determination is made.

(f) Notice to parent of application for relief. If a juvenile seeks release from detention, voluntary departure, parole, or any form of relief from removal, where it appears that the grant of such relief may effectively terminate some interest inherent in the parent-child relationship and/or the juvenile's rights and interests are adverse with those of the parent, and the parent is presently residing in the United States, the parent shall be given notice of the juvenile's application for relief, and shall be afforded an opportunity to present his or her views and assert his or her interest to the district director, Director of the Office of Juvenile Affairs or immigration judge before a determination is made as to the merits of the request for relief.

(g) Voluntary departure. Each juvenile, apprehended in the immediate vicinity of the border, who resides permanently in Mexico or Canada, shall be informed, prior to presentation of the voluntary departure form or being allowed to withdraw his or her application for admission, that he or she may make a telephone call to a parent, close relative, a friend, or to an

organization found on the free legal services list. A juvenile who does not reside in Mexico or Canada who is apprehended shall be provided access to a telephone and must in fact communicate either with a parent, adult relative, friend, or with an organization found on the free legal services list prior to presentation of the voluntary departure form. If such juvenile, of his or her own volition, asks to contact a consular officer, and does in fact make such contact, the requirements of this section are satisfied.

(h) Notice and request for disposition. When a juvenile alien is apprehended, he or she must be given a Form I-770, Notice of Rights and Disposition. If the juvenile is less than 14 years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language he or she understands. In the event a juvenile who has requested a hearing pursuant to the notice subsequently decides to accept voluntary departure or is allowed to withdraw his or her application for admission, a new Form I-770 shall be given to, and signed by the juvenile.

184

(2)

Supreme Court, U.S.
FILED
MAR 21 2011
OFFICE OF THE CLERK

No. 10-658

In the Supreme Court of the United States

DOUGLAS VLADIMIR LOPEZ-DUBON, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly deferred, under *Auer* v. *Robbins*, 519 U.S. 452 (1997), to the Board of Immigration Appeals' interpretation of its own regulation as permitting service on a 17-year-old alien of papers relating to his deportation hearing.

2. Whether the court of appeals correctly determined that such service comports with due process because it is reasonably calculated, under all the circumstances, to apprise the alien of the pendency of the action and afford him an opportunity to present his objections.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 2
Argument 11
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Anaya-Ortiz v. *Holder*, 594 F.3d 673 (9th Cir. 2010) 18
Auer v. *Robbins*, 519 U.S. 452 (1997) 11
Chase Bank USA, N.A. v. *McCoy*, 131 S. Ct. 871 (2011) 12
Clark v. *Martinez*, 543 U.S. 371 (2005) 16
Flores-Chavez v. *Ashcroft*, 362 F.3d 1150 (9th Cir. 2004) ..... *passim*
Llanos-Fernandez v. *Mukasey*, 535 F.3d 79 (2d Cir. 2008) 18
Llapa-Sinchi v. *Mukasey*, 520 F.3d 897 (8th Cir. 2008) 8, 12, 13, 16, 17
Mullane v. *Central Hanover Bank & Trust*, 339 U.S. 306 (1950) 10, 15
Reno v. *Flores*, 507 U.S. 292 (1993) 16
Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) 11

Constitution, statutes and regulations: Page

U.S. Const. Amend. V (Due Process Clause) 10, 15

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546:

§ 304(a)(3), 110 Stat. 3009-587 3

§ 308(b)(6), 110 Stat. 3009-615 3

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2

8 U.S.C. 1101 note 3

8 U.S.C. 1151(b)(2)(A)(i) 19

8 U.S.C. 1154(a)(1)(A)(i) 19

8 U.S.C. 1182(a)(9)(A) 19

8 U.S.C. 1182(a)(9)(B)(i)(II) 19

8 U.S.C. 1182(a)(9)(B)(v) 19

8 U.S.C. 1201(g) 19

8 U.S.C. 1202(a) 19

8 U.S.C. 1229(a) 3

8 U.S.C. 1229(a)(b)(5) 3

8 U.S.C. 1251(a)(1)(B) (1994) 3

8 U.S.C. 1252b (1994) 3

8 U.S.C. 1252b(a)(1) (1994) 3

8 U.S.C. 1252b(a)(1)(F) (1994) 4

8 U.S.C. 1252b(a)(1)(F)(i) (1994) 4

8 U.S.C. 1252b(a)(1)(F)(ii) (1994) 4

8 U.S.C. 1252b(a)(1)(F)(iii) (1994) 4

8 U.S.C. 1252b(a)(2) (1994) 12, 13, 17

8 U.S.C. 1252b(a)(2)(A) (1994) 4

8 U.S.C. 1252b(a)(2)(A)(i)-(ii) (1994) 4

Statutes and regulations—Continued: Page

8 U.S.C. 1252b(c)(1) (1994) 4, 7
8 U.S.C. 1252b(c)(2) (1994) 4
8 C.F.R.:
Pt. 3:
Section 3.26(c) (1997) 4
Pt. 103:
Section 103.5a 2, 12
Section 103.5a (1996) 2
Section 103.5a(a) 12
Section 103.5a(a)(1) 2
Section 103.5a(a)(2)(iv) 2
Section 103.5a(c)(1) 2, 12
Section 103.5a(c)(2) 2, 12
Section 103.5a(c)(2)(ii) 2, 8, 13
Section 103.5a(d) 2, 12
Pt. 204:
Section 204.1(e)(2) 19
Section 204.1(e)(3) 19
Pt. 236:
Section 236.2(a) 3, 15
Pt. 242:
Section 242.3(a) (1996) 3
Pt. 1236:
Section 1236.2(a) 3, 15
Section 1236.3 ..... 9, 15
Section 1236.3(b) 13
Section 1236.3(b)(1)(i)-(iii) 14

Regulations—Continued: Page

Section 1236.3(b)(3) 14
Section 1236.3(b)(4) 14
Section 1236.3(e) 14
Section 1236.3(f) 14
Pt. 1240:
Section 1240.48(b) 15
22 C.F.R. 42.31(a) 19

In the Supreme Court of the United States

No. 10-658

DOUGLAS VLADIMIR LOPEZ-DUBON, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 609 F.3d 642.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2010. A petition for rehearing was denied on August 19, 2010 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on November 16, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. This case concerns the interpretation of a regulation, 8 C.F.R. 103.5a, promulgated by the Attorney General under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Section 103.5a governs service of notifications, decisions, and other papers in administrative proceedings—originally by the Immigration and Naturalization Service (INS), now by the Department of Homeland Security. The regulation provides four methods by which any document may be served, including "by certified or registered mail, return receipt requested, addressed to a person at his last known address." 8 C.F.R. 103.5a(a)(2)(iv); see 8 C.F.R. 103.5a(c)(1) and (d). Most documents may also be served by "mailing a copy by ordinary mail addressed to a person at his last known address." 8 C.F.R. 103.5a(a)(1); see 8 C.F.R. 103.5a(d).

The regulation provides for three exceptions to these rules: for minors under 14 years of age; mentally incompetent persons; and persons who are mentally competent but confined in an institution or hospital. 8 C.F.R. 103.5a(c)(2). The first of those exceptions provides that service on a minor under 14 years of age "shall be made upon the person with whom the * * * minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend." 8 C.F.R. 103.5a(c)(2)(ii).[1]

b. The immigration regulations governing detention of aliens cross-reference the service requirements of Section 103.5a. Specifically, they provide that if the

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[1] Except for an amendment to Section 103.5a(c)(1) not relevant here, the cited provisions of Section 103.5a were identical at the time of the events at issue in this case. See 8 C.F.R. 103.5a (1996).

respondent in immigration proceedings "is confined, or if he or she is an incompetent, *or a minor under the age of 14*, the notice to appear, and the warrant of arrest, if issued, shall be served * * * upon the person or persons specified by [8 C.F.R.] 103.5a(c)." 8 C.F.R. 236.2(a), 1236.2(a) (emphasis added).[2]

c. The foregoing regulations apply to service of documents providing notice of a removal or deportation hearing. This case involves a deportation hearing conducted under a previous version of the INA. Before the INA was amended effective April 1, 1997,[3] an alien who entered the United States without inspection was "deportable." 8 U.S.C. 1251(a)(1)(B) (1994). An alien charged with being deportable before April 1, 1997, was placed in deportation proceedings under 8 U.S.C. 1252b (1994).[4] He was given written notice, known as an Order to Show Cause (OSC), either in person or, "if personal service [was] not practicable, * * * by certified mail to the alien or to the alien's counsel of record, if any." 8 U.S.C. 1252b(a)(1).[5]

Among other things, the written notice informed the alien: (1) that the alien must immediately provide an address and telephone number (if any) at which he could

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[2] At the time petitioner was served, this regulation appeared at 8 C.F.R. 242.3(a) (1996).

[3] On that date, the amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, §§ 304(a)(3), 308(b)(6), 110 Stat. 3009-587, 3009-615, generally took effect. See 8 U.S.C. 1101 note.

[4] All references in this brief to provisions of former Section 1252b refer to the 1994 codification.

[5] The provisions affecting notice of, and failure to appear at, removal proceedings under the INA as amended by IIRIRA appear at 8 U.S.C. 1229(a) and 1229a(b)(5).

be contacted regarding his deportation proceedings, 8 U.S.C. 1252b(a)(1)(F)(i); (2) that the alien must provide the immigration court immediately with any change or update to the address or telephone number he had provided, 8 U.S.C. 1252b(a)(1)(F)(ii); and (3) the consequences of a failure to provide address and telephone information, 8 U.S.C. 1252b(a)(1)(F)(iii), which could include ordering the alien to be deported in absentia if the alien fails to attend a proceeding in immigration court, 8 U.S.C. 1252b(c)(1) and (2).

If the time, date, and place of the hearing were not specified in that notice, a separate hearing notice was required to be likewise given to the alien, or sent by certified mail to the alien or his counsel of record. 8 U.S.C. 1252b(a)(2)(A). That notice advised the alien of the time and place of the hearing and the consequences of a failure to appear at the scheduled proceedings except under exceptional circumstances. 8 U.S.C. 1252b(a)(2)(A)(i)-(ii). That written notice was considered sufficient for purposes of the in absentia deportation provision if sent to the most recent address the alien had provided under 8 U.S.C. 1252b(a)(1)(F). See 8 U.S.C. 1252b(c)(1); 8 C.F.R. 3.26(c) (1997).

When an alien failed to appear for a deportation hearing, the immigration judge (IJ) was required to decide whether clear, unequivocal, and convincing evidence showed both that the alien received proper notice of the hearing and that he was deportable. If so, the IJ was to order the alien's deportation in absentia. 8 U.S.C. 1252b(c)(1). Such an order of deportation could be rescinded by the IJ only upon a motion to reopen filed by the alien; there was no time limit on such a motion if the alien demonstrated that he did not receive the statutorily required notice of the proceedings.

2. Petitioner is a native and citizen of Honduras. Administrative Record (A.R.) 202. In September 1996, he entered the United States illegally, near Brownsville, Texas. *Ibid.*; Pet. App. 1a. At that time, the INS apprehended him and issued him an OSC and Notice of Hearing. A.R. 202-206. The notice was personally served on petitioner, and its provisions were read to him in Spanish, his native language. A.R. 206. The notice alleged that he was deportable for having entered the United States without inspection. A.R. 204. At the time, petitioner was 17 years old. See A.R. 199.

Petitioner was informed that he was required by law to provide immediately, in writing, an address (and telephone number, if any) where he could be contacted and that he was required to provide written notice, within five days of any change in his address or telephone number, to the office of the IJ, whose address was listed in the order. A.R. 205, 206. He was also informed that all notices would be mailed only to the last address he provided. A.R. 205. Petitioner provided a Houston mailing address. A.R. 202.

The OSC ordered petitioner to appear at a hearing before an IJ, at a time to be calendared, with "notice [to] be mailed to the address provided by [petitioner]." A.R. 204 (capitalization omitted). One of the warnings read to petitioner advised him that he was required to be present at the deportation hearing. A.R. 205. If he failed to appear at any hearing, and if the INS established that he was deportable and he had been provided the appropriate written notice of the date, time, and location of the hearing, he would be ordered deported in his absence. *Ibid.*

In June 1997, the immigration court mailed a hearing notice, by certified mail, to petitioner at the Houston

address he had provided, apprising him that a hearing had been set for July 14, 1997. A.R. 183-185, 187-188. The notice was returned because petitioner no longer lived at the address he had provided. Pet. App. 1a. As a result of his failure to appear, the IJ, in July 1997, ordered him deported, in absentia, to Honduras. *Ibid.* A.R. 181.[6]

More than nine years later, in November 2006, petitioner moved the IJ to reopen the deportation proceedings. Pet. App. 1a; A.R. 98-106. He also claimed that he had never received the notice of his deportation hearing. Pet. App. 1a-2a. In February 2003, petitioner had married a naturalized U.S. citizen. A.R. 121-122. She filed an I-130 "petition for alien relative" for petitioner's benefit, and the petition was approved in November 2005. Petitioner included, with his motion to reopen proceedings, an application to adjust his status to that of a lawful permanent resident. A.R. 156-162.

The IJ denied the motion to reopen. Pet. App. 2a; A.R. 87-90. He concluded that, even though the notice of hearing was returned as undeliverable, it constituted legal notice of the hearing, given that the requirement to provide a current address and the consequences of failure to appear were communicated to petitioner in the OSC. A.R. 89. The IJ noted that petitioner "had legal notice of his hearing and failed to appear." *Ibid.* The IJ also pointed out that petitioner never inquired about the deportation hearing he knew he was supposed to have; rather, he simply "disappeared for a period of nine years." *Ibid.* And the IJ concluded that although peti-

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[6] Other hearing notices were sent to petitioner, at this address and others, as petitioner notes (Pet. 5-6). The notice of the July 14, 1997, hearing is the only one relevant to the order of deportation under review here.

tioner was seeking to apply for relief that had not been available to him at the time of his originally scheduled hearing, a motion to reopen on that basis was time-barred. *Ibid.*

3. Petitioner appealed the IJ's decision to the Board of Immigration Appeals (Board). Petitioner did not discuss the notice sent to him in Houston, but argued that because other notices had erroneously been sent to other addresses or to an attorney who did not represent petitioner, the IJ had erred in concluding that notice of the hearing to petitioner was sufficient. A.R. 43-52.

The Board affirmed. A.R. 30-32. The Board concluded that the OSC was served personally on petitioner and specifically informed him of the requirement to keep the IJ informed of his current address; that notice of the hearing was sent by certified mail to the address furnished by petitioner; and that there was no evidence that petitioner ever filed a change-of-address form. A.R. 30-31. Those facts, the Board concluded, were sufficient to establish by clear, unequivocal, and convincing evidence that the alien received "written notice" of the deportation hearing within the meaning of 8 U.S.C. 1252b(c)(1). A.R. 31. The Board noted that petitioner's contentions about other misdirected notices were "irrelevant": "[t]he fact remains that the last hearing notice * * * was sent by the Harlingen Immigration Court to [petitioner] * * * to his address which appears on the Order to Show Cause." *Ibid.*; see Pet. App. 2a.

The Board also separately affirmed the IJ's denial of reopening to apply for adjustment of status. It explained that an alien is not required to rescind his deportation order if he is pursuing an application for new relief. A.R. 31. Rather, the motion to reopen is subject only to the 90-day filing requirement set forth in the

applicable regulations. Because petitioner's motion was untimely, as it was filed more than 90 days after the IJ's decision, the Board determined that petitioner was precluded from having his motion to reopen considered under the general time limitations. A.R. 32.

4. Petitioner next moved the Board to reconsider its decision. A.R. 19-23. Petitioner again did not address the fact that the hearing notice had been served upon him at his address of record; he did not contend that the service by mail was ineffective or should have been made on someone other than himself. Petitioner made two references to his minority: he asserted that "given the fact that [he] was a minor at the time of these proceedings, any doubt should be resolved in favor of [petitioner]," and he asserted that the oral warnings, delivered in Spanish, of the consequences of failure to appear were ineffective because "[a]s a minor, [petitioner] could not have legally possessed the ability to receive any oral warnings." A.R. 21.

The Board denied the motion to reconsider. Pet. App. 10a-13a. The Board explained that, under the INA, petitioner was given proper notice of the deportation hearing. *Id.* at 11a. The Board noted as an initial matter that the pertinent regulation permitted service on petitioner, rather than on an adult guardian. *Ibid.* Under 8 C.F.R. 103.5a(c)(2)(ii), if an alien is a minor under 14 years old, service must be made upon an adult with whom the minor resides, and on a "near relative, guardian, committee, or [next] friend." The regulation imposes no such requirement with respect to service on 17-year-old aliens like petitioner, however. Service on him was therefore proper, the Board concluded. Pet. App. 11a (citing *Llapa-Sinchi* v. *Mukasey*, 520 F.3d 897 (8th Cir. 2008)). The Board then reiterated its previous

decision that, given the various warnings provided to petitioner, service of the hearing notice by certified mail to his last-provided Houston address was appropriate notice. *Id.* at 12a-13a. The Board also reaffirmed that the motion to reopen for adjustment of status was untimely. *Id.* at 13a.

5. Petitioner filed a petition for review. In the court of appeals, he argued for the first time that the notice of hearing was not properly served on him because he was 17 at the time; he contended that notice should have been served upon a responsible adult instead.

The court of appeals denied the petition for review. Pet. App. 1a-9a.

a. The court first concluded that it had jurisdiction to review petitioner's contentions, because although petitioner had failed to exhaust the issue before the Board, the court concluded that the Board had raised and decided *sua sponte* "the question of whether the notice provided to [petitioner] was insufficient because of his age at the time of his detention." Pet. App. 3a.[7]

b. The court of appeals then rejected petitioner's argument that, under the governing regulations, notice should have been served on an adult. The court held that the Board was entitled to deference and that its interpretation of the regulation was reasonable. Pet. App. 3a-4a, 5a-6a.

The court agreed with the Board that Section 103.5a is an "explicit provision calling for service on an adult only if the detained minor is under 14 years of age." Pet. App. 4a. Petitioner relied on a different regulation, 8 C.F.R. 1236.3, which governs the release of juvenile

[7] The court noted that other courts of appeals follow different approaches in reviewing an unexhausted issue addressed *sua sponte* by the Board. See Pet. App. 2a-3a.

aliens from detention and provides for release of a juvenile under age 18 to a parent, guardian, or other adult as specified in the regulation. But the court of appeals found the release regulation inapplicable to the question of who shall receive notice: Section 1236.3 "says nothing about notice," and it "does not cross-reference or address the service provision." Pet. App. 4a, 6a. The court acknowledged a decision of the Ninth Circuit holding that Sections 103.5a and 1236.3 are "inconsistent" unless read to require service on an adult whenever the alien is under 18. *Id.* at 4a-5a (citing *Flores-Chavez* v. *Ashcroft*, 362 F.3d 1150 (9th Cir. 2004)). But the court disagreed with that analysis: "it would be a strained analysis indeed * * * [to] decid[e] not only that the provisions were inconsistent but that the more general release provision somehow negated the specific service provision despite making no reference to notification at all." *Id.* at 6a. The court therefore upheld the Board's reading of its own regulations as reasonable. *Id.* at 5a-6a.

c. The court also rejected petitioner's argument that service of notice of a deportation hearing on a minor constitutes a deprivation of due process under the Fifth Amendment. Pet. App. 6a. Typically, said the court, sending notice of a deportation hearing to an alien satisfies the requirement that service be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Ibid.* (quoting *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950)). The court noted that minors can be responsible for their own legal status and can waive their constitutional rights in some circumstances.

Id. at 7a. And many states allow personal service on minors as young as 14. *Ibid.*

Here, when petitioner was served, he was 17 years old, only one year shy of legal adulthood. He conceded that he was told that he would have to appear for a deportation hearing, that he understood this responsibility, and that he planned to appear. The court held that the notice served in this case sufficed under *Mullane* and that there was no due process violation. Pet. App. 7a.

6. The court of appeals denied rehearing en banc with no judge calling for a poll. Pet. App. 14a-15a.

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted. Although the Ninth Circuit has reached a different conclusion, its decision misinterprets the regulations and fails to apply the necessary interpretive deference to the Board. Since the Ninth Circuit's decision, two other circuits have disagreed with it, and the question is pending before the Board and may soon be addressed in a precedential decision. Accordingly, the Ninth Circuit's outlier decision provides no basis for further review at this time.

1. a. As the court of appeals correctly recognized, this case involves an agency's interpretation of its own regulations. The agency's interpretation may not be set aside unless it is "plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). That principle is controlling here: the Board has reasonably concluded that its regulation addressing service governs when papers must be sent to an alien's adult relative, and that the

separate regulation on release of alien minors from detention does not speak to that question. Contrary to petitioner's contention (Pet. 17-20), the required deference to the Board does not turn on whether the Board has reached that conclusion in the very decision under review, even though that decision is not precedential. Cf. *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 880-881, 882 n.9 (2011) (deferring to agency's interpretation of its own regulation expressed in an amicus brief, and rejecting argument that only a formal opinion rendered through specific procedures can receive *Auer* deference).[8] By citing the on-point Eighth Circuit decision, *Llapa-Sinchi* v. *Mukasey*, 520 F.3d 897 (2008), the Board provided a sufficient explanation of its reasoning. See Pet. App. 5a, 11a. In any event, as discussed below, the Board is currently considering the issue and may issue a precedential decision in the near future. See p. 18, *infra*.

b. The court of appeals correctly sustained the Board's reading as reasonable. The applicable regulation, 8 C.F.R. 103.5a, provides that some papers must be delivered by personal service (including certified mail to a person's last known address, return receipt requested) and that regular mail will suffice for service of all other papers. See 8 C.F.R. 103.5a(a), (c)(1) and (d); see also 8 U.S.C. 1252b(a)(2). The regulation then provides three exceptions to those rules: for minors and for incompetents and persons confined in a penal or mental institution or hospital. 8 C.F.R. 103.5a(c)(2). As relevant here, "in the case of a minor under 14 years of age,

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[8] The cases on which petitioner relies (Pet. 17-20), by contrast, deal with *Chevron* deference to an agency's interpretation of statutory provisions enacted by *Congress*, a different matter. Cf. *Chase Bank*, 131 S. Ct. at 881-882.

service shall be made upon the person with whom * * * the minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend." 8 C.F.R. 103.5a(c)(2)(ii). Thus, notice of petitioner's hearing was served in accordance with the general rules, and because petitioner was not under 14 years of age at the time, the Board reasonably concluded that no more was required. The Eighth Circuit has reached the same conclusion. See *Llapa-Sinchi*, 520 F.3d at 899-901.[9]

Petitioner's contention that Section 1236.3 unambiguously mandates the opposite result is not well taken.[10] Section 1236.3(b) specifies "guidelines" for the release of aliens under age 18. Juveniles who are released from custody (*e.g.*, on bond or parole) are released to one of the adults specified in the regulation, "in order of preference": a parent; a legal guardian; an adult relative; a person designated by a parent or guardian who is in custody or not in the United States; or, "in unusual and compelling circumstances," another adult. 8 C.F.R. 1236.3(b). Adults in the last two categories must "execute an agreement * * * to ensure the juvenile's presence at all future proceedings before [Immigration and Customs Enforcement] or an immigration judge."

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[9] The Ninth Circuit suggested in *Flores-Chavez* v. *Ashcroft*, 362 F.3d 1150 (2004), that Section 103.5a does not address whether service on a minor between ages 14 and 17 is sufficient, or how service is to be effected on juveniles who are released from custody. See *id.* at 1157-1158. That is incorrect: Section 103.5a(c)(1) and (d) make clear that service by certified mail, return receipt requested, to an alien's last known address always suffices *except* when the alien is under age 14, incompetent, or confined. See also 8 U.S.C. 1252b(a)(2).

[10] The regulation that the Ninth Circuit considered in *Flores-Chavez* now appears at Section 1236.3.

8 C.F.R. 1236.3(b)(3) and (4). Although other provisions of Section 1236.3 discuss various forms of notice to adults, 8 C.F.R. 1236.3(e) and (f), nothing in the regulation addresses who shall receive notice of proceedings against the juvenile once the juvenile is released.

Petitioner's argument, like the Ninth Circuit's in *Flores-Chavez* v. *Ashcroft*, 362 F.3d 1150 (2004), is that Section 1236.3 implicitly gives a particular adult general responsibility for the juvenile alien, a responsibility that, also implicitly, extends to receiving service of official papers in the juvenile alien's stead. See, *e.g.*, *id.* at 1159 (asserting that Section 1236.3 reflects a regulatory "presumption * * * that alien juveniles under eighteen require a responsible adult to help them navigate final immigration proceedings"). But nothing in Section 1236.3 so provides; indeed, the Ninth Circuit drew this proposition not from anything in the text of the regulation, but from what the Ninth Circuit described as "[t]he fair implication of [Section 1236.3] as a whole." *Id.* at 1156. That interpretation is flawed. Section 1236.3 addresses the custodial responsibilities of the adult only in "unusual and compelling circumstances" or when a parent is either in custody or out of the country. See 8 C.F.R. 1236.3(b)(3) and (4). In most cases, Section 1236.3 simply provides that the alien will be released to a parent, guardian, or other relative, without specifying anything about that person's responsibility. See 8 C.F.R. 1236.3(b)(1)(i)-(iii). Mere silence cannot be enough to *unambiguously* displace the plain terms of the service regulation, Section 103.5a.

The Ninth Circuit also erred in its supposition that the release regulation is a more specific provision that presumptively controls over the more general service regulation. 362 F.3d at 1158. The provision that specifi-

cally addresses service of notice, on adults and juveniles alike, is the service regulation, Section 103.5a. Section 1236.3 may provide a "detailed framework for the release and ensuing custody of juveniles," *ibid.*, but nothing in that framework relieves any alien of responsibility to update his address or to act on papers served on him at that address. To the contrary, the detention and release regulations make clear that Section 103.5a governs when service is to be made on a guardian in this context. See 8 C.F.R. 236.2(a), 1236.2(a). And Section 103.5a draws the line at age 14. Other regulations draw the line in other places for other purposes, such as competency to make binding admissions in immigration court. See, *e.g.*, 8 C.F.R. 1240.48(b) (providing that "[t]he immigration judge shall not accept an admission of deportability from an unrepresented respondent who is * * * under age 16 and is not accompanied by a guardian, relative, or friend").[11]

The Board's interpretation of its regulations—that the service provisions of Section 103.5a, not the release provisions of Section 1236.3, specify who shall receive notice—is thus not plainly erroneous or inconsistent with the regulations. The court of appeals correctly deferred to that interpretation.

c. The court of appeals also correctly held that service of notice of a deportation hearing on a minor between ages 14 and 17 does not violate the Fifth Amendment's Due Process Clause. Pet. App. 6a-7a. Analyzing such service under *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950), the court concluded that

[11] The Ninth Circuit in *Flores-Chavez* relied on the predecessor of this regulation and other limitations that would have applied to Flores-Chavez, who was 15. See 362 F.3d at 1159, 1160. None of these limitations would have applied to petitioner, who was nearly 18.

the notice served in this case was reasonably calculated, under all the circumstances, to apprise petitioner of the pendency of the deportation proceeding and to afford him an opportunity to present any objections to the deportability charge. Pet. App. 7a. That decision is consistent with *Mullane* and with this Court's other decisions, and petitioner does not contend that it conflicts with the decision of any other court of appeals.[12] That holding, too, does not warrant further review.

As the court of appeals pointed out (Pet. App. 7a), there is no categorical rule that minors under the age of 18 are incapable of waiving rights (or taking action to preserve rights). Indeed, this Court rejected such a rule in *Reno* v. *Flores*, 507 U.S. 292 (1993), a case also involving juvenile aliens. See *id.* at 309 (declining to presume that juvenile aliens in immigration custody, "[m]ost [of whom] are 16 or 17 years old," are universally "too young or too ignorant to exercise [their] right [to a hearing] when the form asking them to assert or waive it is presented"). And minors are competent to waive various other legal rights, including *Miranda* rights, the right to appeal, and the right to a jury trial. *Ibid.*; *Llapa-Sinchi*, 520 F.3d at 900.

Petitioner argues (Pet. 15) that the notice provided under the regulation is not reasonably calculated to reach alien minors, because the regulation addresses service only of the initiating notice, not a subsequent paper that may contain the time and place of the hearing. But that contention has nothing to do with the

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[12] The Ninth Circuit in *Flores-Chavez* did not squarely reach a due process issue, although it interpreted the regulations with constitutional concerns in mind. See 362 F.3d at 1160-1162. See generally, *e.g.*, *Clark* v. *Martinez*, 543 U.S. 371, 381-382 (2005) (contrasting decisions avoiding constitutional questions with decisions resolving them).

question presented in *this* case: whether notice of the time and place of the hearing sent by certified mail to the last known address provided by the alien,[13] coupled with a warning to the alien in his native language that he must keep the immigration court informed of his address, is reasonably calculated to provide constitutionally adequate notice to a 17-year-old alien in petitioner's circumstances. The court of appeals correctly concluded that the procedure is constitutionally adequate.

2. Although there is tension between the decision below and the Eighth Circuit's decision in *Llapa-Sinchi*, on the one hand, and the Ninth Circuit's decision in *Flores-Chavez*, on the other, the issue does not warrant review at this time.

The Ninth Circuit was the first to address the question, and the subsequent decisions in *Llapa-Sinchi* and in this case have clarified several respects in which the Ninth Circuit misinterpreted the regulatory framework. For instance, the Ninth Circuit discerned no reason for departing from what it considered to be a presumption implicit in the release regulation, *i.e.*, that aliens under age 18 require the assistance of an adult. See *Flores-Chavez*, 362 F.3d at 1159. As the Eighth Circuit subsequently explained, the service and release regulations serve different purposes: "The purpose of the notice provision is to let individuals know the details of their legal proceedings. The purpose of the release provision, however, is not to provide knowledge, but to provide assistance to minors in a foreign land, perhaps for the first time," including "assistance * * * to obtain basic necessities." *Llapa-Sinchi*, 520 F.3d at 900-901. The

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[13] The statute, not the regulation, prescribed certified mail as the method of notification. See 8 U.S.C. 1252b(a)(2).

Board endorsed the Eighth Circuit's interpretation in this case. Pet. App. 11a. Accordingly, it is entirely possible that the Ninth Circuit will revisit *Flores-Chavez* in a future case. Cf., *e.g.*, *Anaya-Ortiz* v. *Holder*, 594 F.3d 673, 677-678 (9th Cir. 2010) (abandoning circuit precedent in light of a subsequent Board decision entitled to *Chevron* deference).

The case for revisiting *Flores-Chavez* would be particularly strong if the Board issues a published, precedential decision on the question. The Board may soon be in a position to do just that. Recently, the Board called for supplemental briefing on this question in a pending case, *In re Mendoza-Arqueta*. The Department of Homeland Security filed its response to the supplemental briefing order in December 2010, and the case is still pending.[14]

Furthermore, this case differs factually from *Flores-Chavez*, and as a result several aspects of the Ninth Circuit's reasoning are inapplicable. In this case, the administrative record does not reflect (and petitioner does not allege) that petitioner was released into the custody of an adult, and if so, whether the adult in fact undertook to ensure that petitioner appeared at his hearing. Compare *Flores-Chavez*, 362 F.3d at 1154 & n.2. The Ninth Circuit also relied on inferences based on how Flores-Chavez, who was 15, would be treated under other age-based regulations. No such inferences would benefit petitioner, who was 17—indeed, nearly 18—at the time of his hearing. See note 11, *supra*. Thus, the Ninth Circuit might well uphold a decision like the

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[14] The Second Circuit had previously remanded another case to the Board so that it could provide guidance on this question, see *Llanos-Fernandez* v. *Mukasey*, 535 F.3d 79, 85 (2008), but the issue did not arise on remand in *Llanos-Fernandez* itself.

Board's in this case as reasonable in these circumstances, even in light of *Flores-Chavez*.

3. In any event, this case would be a poor vehicle by which to resolve the questions presented. Petitioner states (A.R. 44) that he has Temporary Protected Status as a citizen of Honduras and thus is not immediately subject to deportation. And although petitioner's motion to reopen his deportation proceedings was intended to allow him to pursue adjustment of status, petitioner need not obtain reopening in order to become a lawful permanent resident. Rather, he may seek the status of lawful permanent resident by applying for an immigrant visa from an overseas consular officer, because petitioner is now the beneficiary of an approved I-130 "immediate relative" visa petition. See 8 U.S.C. 1151(b)(2)(A)(i), 1154(a)(1)(A)(i), 1201(g), 1202(a); 8 C.F.R. 204.1(e)(2) and (3). Indeed, whereas adjustment of status is discretionary, a consular officer who is presented with an approved petition for an immediate-relative visa has no discretion to deny an immigrant visa to an alien who is not inadmissible under 8 U.S.C. 1182. See 8 U.S.C. 1201(g); 22 C.F.R. 42.31(a). Petitioner may be subject to a period of inadmissibility based on his having been unlawfully present in the United States for more than one year. See 8 U.S.C. 1182(a)(9)(B)(i)(II). That period, however, may be waived by the Attorney General, the Secretary of Homeland Security, or their designees, based on extreme hardship. See 8 U.S.C. 1182(a)(9)(B)(v); see also 8 U.S.C. 1182(a)(9)(A) (similar period of inadmissibility following removal, also waivable by the Attorney General, the Secretary of Homeland Security, or their designees).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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